United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Docket No. 75-7304

IN THE

United States Court of Appeals

For the Second Circuit

IN THE MATTER OF ARBITRATION

between

STEPHEN E. BRESSETTE, etc.,

Appellant,

–and–

INTERNATIONAL TALC CO., INC., et. al.,

Appellees.

On Appeal of A Judgment And Final Order From the Federal District Court, Northern District of New York

B P/S

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

This is an action to compel a signatory to a collective bargaining agreement to arbitrate certain grievances. The Appellant, Local Union No. 22727, AFL-CIO, American Federation of Labor and Congress of Industrial Organizations ["Union"] commenced the proceeding in the Federal District Court, Northern District of New York. Appellee, International Talc Company, Inc. ["Company"] opposed the action. And, by oral decision, dated April 14, 1975, the Honorable Edmund Port, United States District Judge, refused to compel arbitration and dismissed the Petition.

A full statement of the case and of the facts appears at pages 1 through 5 of the Union's previous brief ["Appellant's Brief"]. The Union's argument in chief also appears in its previous brief. Thus, this brief is submitted only in reply to arguments raised in the Company's "Brief for Appellees".

ARGUMENT

POINT I

DISCRIMINATORY INTENT IS NOT RELEVANT WITH REGARD TO ARBITRABILITY

The Company claims that it cannot be compelled to arbitrate the dispute because it lacked discriminatory intent when it

terminated its business [CB 6].* That is, it is the Company's assertion that in the absence of discriminatory motive, it may breach the Agreement with impunity. To support its position, the Company relies upon the decision in Textile Workers Union v. Darlington Mfg. Co., 383 U.S. 263, 58 LRRM 2657 (1965)[CB 6-7].

The Company's position is erroneous because discriminatory intent is not relevant when determining the arbitrability of a grievance. It is submitted that the Company's erroneous analysis of the problem was caused by its confusion over statutory rights under the Labor Management Relations Act ["Act"][29 U.S.C. §§141 et seq.] and contract rights under the Agreement between the parties. This confusion has led the Company to a misplaced reliance upon Textile Workers Union v. Darlington Mfg. Co., 383 U.S. 263, 58 LRRM 2657 (1965) [CB 6-7], which only dealt with statutory rights.

A. The Irrelevancy of Motivation With Regard To Arbitrability.

There are only two questions that may be addressed when arbitrability is at issue, to wit, have the parties agreed to submit all questions of the interpretation of their contract to arbitration, and is the asserted claim, on its face, governed by the contract [United Steelworkers v. American Mfg. Co., 363

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* References in this form are to the pages of the Company's brief ["Brief for Appellees"].

U.S. 564, 567-68, 46 LRRM 2414, 2415 (1960)].*

Conspicuously absent from this formula is anything concerning a party's motivation in breaching the contract. That is, the Company's motivation in breaching the Agreement is irrelevant when determining arbitrability.

The Company's argument is, in fact, addressed to the "merits" of the grievance, not its arbitrability. As such, it must be presented to the arbitrator and not to this Court.**

The Company's misstatement of the relevancy of discriminatory intent is apparently caused by its confusion over statutory and contract rights. When an employer's conduct is motivated by anti-union animus, a violation of Section 8 (a)(1) and (3) of the Labor Management Relations Act ["Act"] [29 U.S.C. §158(a)(1) and (3)] may occur. [See, e.g. N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 53 LRRM 2121 (1963)]. The remedy for such violation must be sought before the National Labor Relations Board ["Board"][Sections 10 et seq. of the Act; 29 U.S.C. §§160 et seq.; San Diego

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* For a full discussion of the application of these criteria to the instant case, see Appellant's Brief, pgs. 6-11.

** Discussed hereinafter at POINT II, is the fact that the courts cannot review the merits of the grievance when passing upon its arbitrability.

Parenthetically it is noted that discriminatory intent is not even a part of the Union's grievance herein, that is, the Union does not claim that the Company's breach of the Agreement consisted of a prohibited motivation in terminating the business.

Building Trades Council v. Garmon, 359 U.S. 236, 43 LRRM 2839 (1959)].

Although the lack of discriminatory intent might be a defense to a Board proceeding pursuant to section 8(a)(1) and (3) of the Act, it is not a defense to a proceeding to compel arbitration. [United Steelworkers v. American Mfg. Co., supra].

B. The Company's Reliance Upon Textile Workers Union v. Darlington Mfg. Co. Is Misplaced.

The Company's confusion over contract rights versus statutory rights has led it to erroneously rely upon Textile Workers Union v. Darlington Mfg. Co., supra, 380 U.S. 263, 58 LRRM 2657 (1965). That case concerned only the alleged violation of the Act; it did not deal with violation of contract rights.

In Darlington, supra, the employer terminated its business because of anti-union animus. The union filed a charge with the National Labor Relations Board, which found that an unfair labor practice had been committed.

The Supreme Court, however, reversed an enforcement order of the fourth circuit court of appeals and held that the employer's conduct did not violate the Act. The Supreme Court, at 273-74, 58 LRRM, at 2661, stated:

> We hold here only that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness

> towards the union, such action is not an unfair labor practice. [Emphasis added].

The reason for this holding was that:

> The Act "does not compel a person to become or remain an employee. It does not compel one to become or remain an employer. Either may withdraw from that status with immunity, so long as the obligations of an employment contract have been met." [Emphasis added; Id., at 271, 58 LRRM, at 2660.]

It is clear, therefore, that the decision in Darlington, supra, was dictated by the Act and concerned only violations of the Act. The Court did not rule that an employer may terminate its business in violation of a collective bargaining agreement; rather, the Court specifically indicated that an employer may not terminate his business in violation of such an agreement. [See, also, Goodall-Sanford, Inc. v. Textile Workers, 233 F.2d 104, 110, 38 LRRM 2033, 2037 (1st Cir. 1956), affirmed, 353 U.S. 550, 40 LRRM 2118 (1957); Local 396, IBT v. Hearst Publishing Co., 206 F.Supp. 594, 600, 50 LRRM 2718, 2723 (S.D.Cal. 1962)].

POINT II

THE COMPANY'S ARGUMENT ON THE MERITS OF THE GRIEVANCE IS IRRELEVANT

The Company seeks to avoid arbitration by setting forth

various arguments designed to show that the Union cannot succeed on the merits of its grievance. Those arguments are, of course, irrelevant here. [United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568, 46 LRRM 2414, 2415-16 (1960)].

The Company argues: that the termination of its business terminates its obligations under the Agreement; and that the Agreement's silence on business termination defeats the Union's claims [CB 8-10].* These arguments are clearly addressed to the merits of the issues to be arbitrated, i.e., what obligations of the Company, under the Agreement, survive termination of the business and/or whether the Agreement prohibits the Company from terminating its business during its unexpired term.

In United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568, 46 LRRM 2414, 2415-16 (1960), the Supreme Court advised that:

> The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit

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* The Company also argues that in the absence of discriminatory intent, it can terminate its business at will and cannot be compelled to arbitrate disputes over that action [CB 6]. This argument is also addressed to the "merits" since it presupposes the lack of discriminatory intent. But the Union has not asserted discriminatory intent herein; only that the Company has breached the Agreement.

> all grievances to arbitration, not merely those which the court will deem meritorious. [Citations omitted].

Thus, whether the Company will succeed on the merits of the arbitration is not relevant. What is relevant is that the parties have agreed to submit all disputes as to the meaning or application of the Agreement to arbitration and that the grievance, on its face, is covered by the Agreement [Id.].

For the foregoing reasons it is clear that the Company's reliance upon Fraser v. Magic Chef-Food Giant Markets, Inc., 324 F.2d 853, 54 LRRM 2759 (6th Cir. 1963) is misplaced. That case did not concern the arbitrability of a grievance; rather, it was an action, at law, "to recover the wages that [ex-employees] would have received if the company had continued to operate throughout the duration of the contract." [Id., at 855, 54 LRRM, at 2759]. In other words, because arbitrability was not at issue, the court had before it the merits of the dispute.

But, in the case at bar, arbitrability is at issue. Thus, whether the employees are entitled to their wages for the duration of the Agreement, among other issues, are questions for the arbitrator; not for this Court [United Steelworkers v. American Mfg. Co., supra].

POINT III

REFUSAL OF THE BOARD TO ISSUE A COMPLAINT IS NOT A BAR TO ARBITRATION

The Company asserts, in a series of confusing declarations,

that the refusal of the Board to issue an unfair labor practice complaint is a bar to arbitration.* It is submitted that the Board's refusal to issue a complaint is irrelevant and not a bar to arbitration.

In IUE v. General Electric Co., 407 F.2d 253, 264, 70 LRRM 2082, 2090 (2d Cir. 1968), cert. denied, 395 U.S. 904, 71 LRRM 2254 (1969), this Court emphatically rejected the Company's argument. The Court stated:

> The Company's chief argument in opposition to arbitration rests on the refusal of a Regional Director of the National Labor Relations Board to issue a complaint of unfair labor practice regarding the alleged discharge on grounds that there was insufficient evidence of violation of section 8(a)(1) of the National Labor Relations Act. The Company claims that this refusal constituted a binding determination of the dispute and precludes the Union from seeking relief through arbitration. But apart from the fact that the legal issues before the Regional Director and an arbitrator are different . . . the proceeding before the Board was administrative only, neither formally adversarial nor like a trial. As such, it has no collateral estoppel effect. [Emphasis added; citations omitted].

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* At page 5 of its brief, the Company asserts that the refusal of the Board to issue a complaint is "res adjudicata" [sic]. The Company then declares that it does not contend that the refusal to issue a complaint precludes bringing this proceeding. Finally, at page 6 of its brief, the Company concludes by citing a treatise on Business Organizations which asserts a "considerable, if not binding, effect" of the refusal to issue a complaint.

See, also, Monroe Sander Corp. v. Livingston, 377 F.2d 6, 9, 65 LRRM 2273, 2274 (2d Cir.), cert. denied, 389 U.S. 831, 66 LRRM 2308 (1967), where although an unfair labor practice charge filed by the union was dismissed by the Board, this Court indicated that the only questions concerned the arbitrability of the dispute, the issue to be arbitrated, etc. The Court ordered arbitration.

It is clear, therefore, that the refusal of the Board to issue a complaint herein is not a bar to arbitration.

POINT IV

DISPUTES OVER TERMINATION OF THE AGREEMENT ARE FOR THE ARBITRATOR; BUSINESS TERMINATION DOES NOT TERMINATE THE OBLIGATION TO ARBITRATE

The Company asserts that it is for the Court to determine when the Agreement herein terminates [CB 14]. The Company further asserts that the termination of its business terminates its obligation to arbitrate [CB 14]. These assertions are clearly erroneous.

A. Disputes over Termination of the Agreement Are For the Arbitrator.

The grievance-arbitration clause of the Agreement provides, in relevant part, that:

> The purpose of the grievance procedure shall be to provide for the orderly and amicable settlement of any and all disputes, differences,

> and grievances arising out of the meaning or application of the terms of this agreement. [Emphasis added][A 22; §6].

Clearly, disputes over when the Agreement terminates concern the "meaning or application of the terms" of the Agreement. Thus, when and if the Agreement terminated by reason of the termination of the Company's business is a question that must be decided by an arbitrator.

In Local 4, IBEW v. Radio Thirteen-Eighty, Inc., 469 F.2d 610, 81 LRRM 2829 (8th Cir. 1972), the employer also argued that it was for the court to determine when the contract terminated.* The grievance clause provided for arbitration:

> In the event of a dispute, difference or disagreement between the Employer and the Union concerning the interpretation or application of the terms of this Agreement . . . . [Emphasis added; supra, at 613, 81 LRRM, at 2830].

The court held that since early termination of the contract concerned the interpretation or application of the contract, arbitration was the appropriate forum to determine whether the contract had terminated early.

In the instant case the grievance clause, providing for arbitration as to the "meaning or application of terms" of the Agreement, is almost identical to the one in Local 4,

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* There, the contract apparently provided for early termination upon the awarding of a certain radio frequency to the employer. In the case at bar, there exists no language providing for early termination.

IBEW, supra. And, the Company asserts that the Agreement terminated early. Thus, arbitration must be ordered herein.

The cases cited by the Company to support its argument that contract termination questions are for the courts are distinguishable from the case at bar on two grounds, i.e. the manner of termination of the agreements and the breadth of the arbitration clauses.

In Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181, 51 LRRM 2752 (2d Cir. 1962) [CB 15-16], the agreement provided for automatic renewal unless notice was given by either party sixty days prior to termination. The union gave such notice. Thus, upon the expiration date there no longer existed an agreement between the parties. In the case at bar, although the Agreement contains a similar 60 day notice provision, it was not exercised by either party. Furthermore, the Company claims that the Agreement "terminated" by the Company's unilateral actions during the first contract period.*

In Auto Workers Local 125 v. ITT, 508 F.2d 1309, 88 LRRM 2216 (8th Cir. 1975)[CB 19-21], the parties had entered into an agreement, collateral to the contract, providing for an early termination of the contract. By the time the union sought arbitration, the contract, pursuant to the collateral

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* The Agreement term was from August 1, 1973 through July 31, 1974, and if no "60 day notice was given" the term was extended for another year [A 29; §§12A, 12B]. The Company asserts the Agreement "terminated" on May 23, 1974, i.e. prior to the expiration of the first contract period.

agreement, had already expired. In the instant case, the parties never entered into an agreement providing for early termination of their collective bargaining agreement.

It is also relevant to note that the Company's lengthy quotation from Auto Workers Local 125 v. ITT, supra, completely excised the court's discussion of the other distinguishing feature of these cases, to wit, the breadth of the arbitration clauses [CB 19-21]. The court, referring to Local 4, IBEW v. Radio Thirteen-Eighty, Inc., supra, 469 F.2d 610, 81 LRRM 2829 (8th Cir. 1972), stated:

> We there held that such a broad arbitration clause indicates an intent to arbitrate disputes relating to a purported termination or expiration of the bargaining agreement. [Id., at 1314, 88 LRRM, at 2217].

As discussed hereinabove, the arbitration clause herein is as broad as the one in Local 4, IBEW, supra.

The other cases cited in Auto Workers Local 125 v. ITT, supra, are also distinguishable from the case at bar. They all concerned either mutual agreements for early termination of the contract, expiration of the contract by its own terms,

or contracts invalid because of fraud.*

In the case at bar, the parties did not enter into a mutual agreement providing for early termination, nor did the Agreement expire according to its own terms, nor is the Agreement alleged to be fraudulent. Thus, the obligation to arbitrate remains inviolate.

B. Business Termination Does Not Terminate the Obligation to Arbitrate Disputes.

The parties herein have agreed to submit to arbitration all disputes concerning the meaning or application of

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* See, OCAW v. American Maize Products Co., 492 F.2d 409, 412, 86 LRRM 2438, 2440 (7th Cir. 1974)("We hold that the only reasonable construction which can be given to the May 22 letter is that it constituted a notice of termination. Hence, under article XXIII, the collective bargaining agreement terminated as of after midnight on August 1, 1972"); ILGWU v. Ashland Industries Inc., 488 F.2d 641, 85 LRRM 2319 (5th Cir. 1974)(collective bargaining agreement apparently vitiated by fraud and therefore no obligation to arbitrate); Local 998, UAW v. B. & T. Metals Co. 315 F.2d 432, 52 LRRM 2787 (6th Cir. 1963)(contract, by its terms, expired prior to dispute arising); UMW, District 22 v. Ronco, 314 F.2d 186, 52 LRRM 2579 (10th Cir. 1963)(contract terminated early by mutual agreement); Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181, 51 LRRM 2752 (2d Cir. 1962)(contract expired by its terms and pursuant to 60 day termination notice); Teamsters, Local 249 v. Kroger Co., 411 F.2d 1191, 71 LRRM 2479 (3rd Cir. 1969)(contract expired by its own terms); M.K.&O. Transit Lines v. Division 892, 319 F.2d 488, 53 LRRM 2662 (10th Cir. 1963)(contract terminated by notice pursuant to clear terms of contract).

the Agreement at least until July 31, 1974 [A 29; §12A].* The Company asserts, however, that when it terminated its business on May 23, 1974, it was no longer obligated to arbitrate disputes. That is, by its unilateral action, the Company asserts it can alter the Agreement with the Union.

It is submitted that there exists no authority, whatever, for the Company's position; rather, the law is clear that the Company must arbitrate the disputes herein.

In United Steelworkers v. American Aluminum Corp., 334 F.2d 147, 150, 56 LRRM 2682, 2684 (5th Cir. 1964), cert. denied, 379 U.S. 991, 58 LRRM 2256 (1965), the employer also argued that termination of its business terminated its obligation to arbitrate disputes. The court, in ordering arbitration, bruskly rejected that argument:

> The other procedural contention, that arbitration may not be had after termination of the contract, warrants no discussion ever since United Steelworkers v. Enterprise Wheel & Car Corp., 1963, 363 U.S. 593, 83 S.Ct. 1358, 4 L.Ed.2d 1424; cf. John Wiley & Sons, Inc. v. Livingston, 1964, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898.

Accordingly, the court ordered arbitration.

In Goodall-Sanford, Inc. v. Textile Workers, supra, 233 F.2d 104, 38 LRRM 2033 (1st Cir. 1956), affirmed, 353

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* However, pursuant to §12B of the Agreement, the obligations thereunder were extended for another year, when neither party served a 60 day notice of its intention of changes desired in the Agreement.

U.S. 550, 40 LRRM 2118 (1957), the employer also argued that it was not obligated to arbitrate disputes over business termination. The Supreme Court, however, disagreed and ordered arbitration.

It is also relevant that the dispute herein arose prior to the alleged "termination" of the Agreement, i.e., when the Company first decided to close its plants without notifying the Union. Disputes which are based upon conditions arising during the term of the agreement to arbitrate are arbitrable after the term of that agreement has expired [See, United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960); Potoker v. Brooklyn Eagle, Inc., 2 N.Y.2d 553, 141 N.E.2d 841 (1957)].

Finally, of course, the Supreme Court has told us that arbitration must be ordered when: (1) the parties have agreed to submit all questions of contract interpretation to arbitration; and (2) the dispute is, on its face, governed by the contract [United Steelworkers v. American Mfg. Co., supra, 363 U.S. 564, 567-68, 46 LRRM 2414, 2415 (1960)]. And, those are the only factors the courts are to look to.

In the instant case, the parties have agreed to submit all disputes concerning the meaning or application of the Agreement to arbitration. The dispute concerns the Company's right to terminate its business and the effect of the Company's termination on the rights of its employees. This clearly concerns the "meaning or application" of the Agreement. Thus, arbitration must be ordered.

POINT V

THE COMPANY'S CHARACTERIZATION OF THE FACTS IS ERRONEOUS

The Company erroneously asserts that the Union's grievance and demand for arbitration failed to identify the issues to be arbitrated [CB 10, 12, 14]. The Company also seemingly asserts that the dispute may have been, in some way, settled [CB 14].

It is submitted that the former claim is merely a subterfuge to avoid arbitration by refusing to agree on the precise issue to be arbitrated. The latter argument is unsupported by the record and demonstrably false. In any event, that argument raises questions of procedural arbitrability, which must be submitted to the arbitrator.

A. The Grievance and Demand For Arbitration Clearly Identifies the Dispute.

The Union's grievance, dated July 26, 1974 [A 36], clearly advised the Company that the dispute concerned its "partial closing" of its business; that the "partial closing" violated the Collective Bargaining Agreement between the parties; and violated the rights of the employees under the Agreement. The grievance went on to advise the Company that it had violated the Agreement in: failing to notify the Union of the impending closing; failing to bargain with the Union over same; and failing to protect the Union's rights under the successorship clause of the Agreement. Finally, the Company

was advised that its acts violated other rights of the Union.

Lest there by any question concerning notification of the foregoing, reprinted hereinafter is the grievance and demand of July 26, 1974:

> Talc Workers Union Local No. 22727, AFL-CIO, party to a collective bargaining agreement with your company, effective August 1, 1973, has a dispute with your company as to the meaning and application of the terms of that agreement. The dispute is as follows:
>
> > The company has violated the collective bargaining agreement, and the rights of its employees thereunder, by its partial closing, and termination of employees, without notification and bargaining with the Union, without protecting the Union's rights under the successorship clause in the agreement, and by failing to provide adequate information by which the Union can pursue its legal and/or contractual rights; the company has also violated the rights of its employees under the negotiated Pension Plan.
>
> The Union is available to discuss this dispute with you. If we cannot reach agreement on this matter, the dispute will be submitted to arbitration pursuant to the agreement.

This grievance, like the ones in John Wiley & Sons v. Livingston, 376 U.S. 543, 55 LRRM 2769 (1964) and in Machinists v. Howmet Corp., 466 F.2d 1249, 1252, 81 LRRM 2289, 2291 (9th Cir. 1972), raises the question: "What is the effect of the merger [plant closure] on the rights of the covered employees." And, as stated in Machinists v. Howmet Corp., supra:

> That question can be best answered by reference to and interpretation of the terms of the Agreement itself, a function of the arbitrator.

The Company, however, has seen fit to ignore the foregoing and, apparently "tongue in cheek" poses the question: "What were matters in dispute?" [CB 14]. It is submitted that it is clear what are the matters in dispute, and that the Company's feigned ignorance is but a subterfuge to avoid arbitration by refusing to agree on the precise issue to be arbitrated.

B. Arbitration Cannot Be Avoided By Refusing to Agree to the Issue To Be Arbitrated.

The Company seeks to avoid arbitration by professed ignorance over the issue to be arbitrated, i.e., by refusing to agree on the precise issue. The Company cannot succeed on such a claim.

In Avon Products, Inc. v. UAW, Local 710, 386 F.2d 651, 67 LRRM 2001 (8th Cir. 1967), the employer also refused to arbitrate certain grievances, alleging that one of the grievances was "ambiguous." The court, in rejecting that argument and compelling arbitration observed that:

> [O]ne party cannot frustrate the arbitration process by refusing to agree on the form of the issue to be submitted to arbitration [Id., at 657, 67 LRRM, at 2004].

See, also, Vaccuum Tanker Men's Assn. v. Socony Co., 369 F.2d 480, 63 LRRM 2510 (2d Cir. 1966), where this Court rejected

the employer's argument that in the absence of agreement on the issue, arbitration could not be compelled. The Court, of course, did compel arbitration.

C. There Has Been No Settlement of the Dispute.

The Company asserts, finally, that the dispute was possibly "resolved, settled, accepted . . . or waived as a result of the August 29, 1974 meeting" [CB 14]. First, it is observed that the record is devoid of any evidence that the dispute was in any way "resolved, settled, accepted . . . or waived"; rather, the record, as well as the Company's brief, establishes that the dispute is still arbitrable.

The Company acknowledges that since May 23, 1974, when the business terminated, the Union has always taken the position that the Agreement was being breached [CB 7]. Furthermore, the Union has continuously sought arbitration of the disputes. On July 24, 1974, the Union served its grievance and demand for arbitration [A 36]. When the Company refused to arbitrate, the Union filed a petition to compel arbitration [A 7-9]. These are hardly the actions of a party who has "resolved, settled, accepted . . . or waived" the dispute.

Finally, the record indicates that at no time did the Company bargain with the Union over the termination of business. Thus, no resolution of the dispute could have taken place on August 29, 1974, or at any other time. Mr. Frederick Kuehl, Vice-President of Operations of the Company testified

herein [A 94] as follows:

> Q. And did you negotiate at all with the union relative to cessation of the use of that equipment and power plants?
>
> A. You mean previous to the shutdown?
>
> Q. That's correct.
>
> A. I don't quite understand the question, whether we negotiated with the union.
>
> Q. Did you discuss with them what the company was going to do relative to closing down the power plants?
>
> A. No. I did not.
>
> Q. Did anybody on behalf of the company do it?
>
> A. Not to my knowledge.
>
> Q. And after the power plants were shut down, Mr. Kuehl, did you ever discuss the closing down of the power plants with the union?
>
> A. Only that they were closed down and were going to be closed down permanently, and the people were therefore discharged or laid off.
>
> Q. That was the extent of your discussion?
>
> A. As I remember it, yes.

It is clear, therefore, that the dispute was never "resolved, settled, accepted . . . or waived."

In any event, the questions raised by the Company are procedural matters intertwined with the merits of the dispute.

Thus, they must be submitted to arbitration. In John Wiley & Sons v. Livingston, 376 U.S. 543, 557, 55 LRRM 2769, 2775 (1964), the Supreme Court observed that:

> Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration. . . .
>
> Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

It is submitted, therefore, that the Company has not and cannot establish any valid reasons to avoid arbitration. Accordingly, arbitration must be ordered.

CONCLUSION

For all of the reasons and authorities set forth hereinabove and set forth in Appellant's Brief, it is respectfully submitted that the District Court erred in refusing to order arbitration and in dismissing the Petition. That decision must be reversed, and arbitration must be ordered.

Respectfully submitted,

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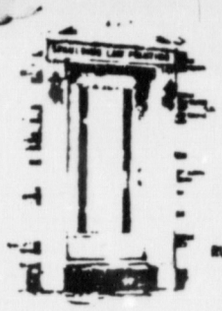

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Stephen E. Bressette, etc. and Interational Talc Co., Inc., et al.
Docket ~~Index~~ No. 75-7304

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Everett J. Rea

cc: Blitman and King

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